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No. 262.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

LOUIS J. BECKER, Collector of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, a Corporation, and WILLIAM EDWIN GUY, Excutors of the Estate of WILLIAM EVANS GUY, Deceased,
Respondents.

BRIEF IN OPPOSITION TO PETITION OF GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RHODES E. CAVE,
THOMAS S. McPHEETERS,
CRAWFORD JOHNSON,
(1630 Boatmen's Bank Building,
St. Louis, Missouri),
Attorneys for Respondents.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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OF GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PRELIMINARY STATEMENT.

This brief is respectfully submitted on behalf of the respondents in opposition to the pending "Writ of Certiorari" filed for Louis J. Becker, Collector of Internal Revenue, by the Solicitor General.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 13, 1935. A petition for rehearing was denied on April 19, 1935 (R. 145). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE INVOLVED.

Revenue Act of 1926, c. 27, 44 Stat. 9:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> "(a) To the extent of the interest therein of the decedent at the time of his death;
>
> • • • • • • •
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. • • •
>
> • • • • • • •
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this act.
>
> • • • • • • •
>
> (U. S. C. App., Title 26, Sec. 1094.)"

STATEMENT.

The facts stated in the petition with reference to the question of whether or not the trusts involved were intended to take effect at or after death are sufficient, except that a fair statement should include the fact that the granting clause of each of the trust instruments involved provided "I, William Evans Guy, • • • hereby declare • • • that I hold in trust for my daughter (or son, naming him or her) the following property" (R. 31). With respect to the facts in connection with the question of whether or not the trusts here involved were created in contemplation of death, we respectfully refer the Court to the opinion of the Circuit Court of Appeals (R. 124 et seq.), in which the facts are fully and fairly stated.

QUESTION PRESENTED.

The question presented is whether a mere possibility of reverter remaining in a grantor after the granting of an equitable fee in trust property to a named beneficiary, subject, however, to defeasance by the death of the beneficiary prior to that of the grantor, is a sufficient interest in the trust property to justify inclusion of the entire value thereof in the grantor's estate for estate tax purposes.

SUMMARY OF ARGUMENT.

I.

There is no similarity between the instant case and the case of Helvering, Commissioner, v. St. Louis Union Trust Company, 75 Fed. (2) 416 (C. C. A. 8). Certiorari was granted in that case because of the conflict between the decision therein and the decision of the Circuit Court of Appeals for the Second Circuit in Commissioner v. Schwarz, 74 Fed. (2) 712. In the Orthwein case and the Schwarz case life estates were granted with remainders over in the respective grantors. In the instant case a defeasible equitable fee was given each beneficiary with a mere possibility of reverter in the grantor. No conflict exists between the decision in the instant case and the decision in the Schwarz case, so that the ground upon which certiorari was granted in the Orthwein case is absent here.

Helvering v. St. Louis Union Trust Company, 75 Fed. (2d) 416 (C. C. A. 8), certiorari granted May 20, 1935, No. 25, Oct. Term, 1935;

Commissioner v. Schwarz, 74 Fed. (2d) 712 (C. C. A. 2);

Klein v. United States, 283 U. S. 231;

Rollestone v. National Bank of Commerce, 299 Mo. 57, l. c. 70, 252 S. W. 394;

Korompolis v. Tompras, 251 S. W. 80 (St. Louis Court of Appeals);

Northrip v. Burge, 255 Mo. 641, 164 S. W. 584;

Deacon v. St. Louis Union Trust Company, 271 Mo. 669, l. c. 678, 679, 689, 690, 691, 197 S. W. 261;

Pollard v. Union National Bank, 4 Mo. App. 408;

Patrick v. Blair, 119 Mo. 105, 24 S. W. 767;

Edson v. Lucas, 40 Fed. (2d) 398 (C. C. A. 8);

Commissioner v. Wallace, 71 Fed. (2d) 1002 (C. C. A. 2), certiorari denied 293 U. S. 600;

Helvering v. Duke, 290 U. S. 591;
McCormick v. Burnet, 283 U. S. 784;
Commissioner v. Bonney, 75 Fed. (2d) 1008 (C. C. A. 2);
Commissioner v. Dunham, 73 Fed. (2d) 752 (C. C. A. 7).

II.

There is no uncertainty existing by reason of the decision of this Court in the case of Helvering v. Duke, 293 U. S. 591, when applied to the facts in the instant case. The instant case is controlled by the decisions of this Court in McCormick v. Burnet, 283 U. S. 784, and Commissioner v. Wallace, 293 U. S. 600.

III.

The fact that distribution of the trust property was to be made upon the death of the grantor afforded no evidence that the trusts were created in contemplation of death, and the Circuit Court of Appeals was correct in so holding in this case. A contrary holding would have contravened the following decisions of this Court.

Reinecke v. Northern Trust Company, 278 U. S. 389;
May v. Heiner, 281 U. S. 238;
McCaughn v. Carnill, 43 Fed. (2) 69 (C. C. A. 3), certiorari denied 283 U. S. 825;
Hodgkins v. Commissioner, 44 Fed. (2) 43 (C. C. A. 7), certiorari denied 283 U. S. 825;
Burnet v. Northern Trust Company, 283 U. S. 782;
Morsman v. Burnet, 283 U. S. 783;
McCormick v. Burnet, 283 U. S. 784.

ARGUMENT.

The reasons assigned in the petition for granting the writ are as follows:

First. That the instant case is similar to Helvering v. St. Louis Union Trust Company (Orthwein Estate), No. 25, October Term, 1935, in which this Court granted certiorari on May 20, 1935.

Second. That the instant case is similar to the case of Helvering v. Duke, 290 U. S. 591, concerning which there is an existing uncertainty which needs to be cleared up; and

Third. That the position of the court below that the transfers by decedent were not made in contemplation of death is erroneous—the last reason being assigned as one to be urged in the alternative in the event the petition for writ of certirorari is granted.

As to the first ground, we respectfully submit that there is no similarity between the instant case and the Orthwein case, and that the reasons assigned for granting certiorari in the Orthwein case could not be and have not been assigned as reasons for granting certiorari in this case. The principal reason assigned for granting certiorari in the Orthwein case was that a conflict of decision existed between the decision of the Circuit Court of Appeals for the Eighth Circuit in the Orthwein case, 75 Fed. (2) 416 (C. C. A. 8), and the decision of the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Schwarz, 74 Fed. (2) 714 (C. C. A. 2). In the Orthwein case and in the Schwarz case a life estate was granted to a named beneficiary, with provision that upon the termination of the life estate the property should be

turned over to the grantor, if then living, and, if not then living, to the grantor's descendants, in the Schwarz case, and to other named beneficiaries, in the Orthwein case. In both cases only a life estate was granted presently with remainder in the grantor upon the termination of the life estate. See Commissioner v. Schwarz, supra, l. c. 714.

With respect to the fact that only a life estate was presently granted, both the Schwarz case and the Orthwein case are similar to the case of Klein v. United States, 283 U. S. 231, 51 Sup. Ct. 398, 75 L. Ed. 996. The critical fact in both the Schwarz case and the Orthwein case is the granting of the life estate in the beneficiaries. In this respect the two cases are utterly dissimilar to the instant case. Here no life estate of any sort is granted. By the granting of these trusts, Mr. Guy declared that "I hold in trust for my daughter (or son, naming him or her) the following property," etc. This clause, standing alone, would have vested a complete equitable fee in the respective beneficiaries.

Rollestone v. National Bank of Commerce, 299 Mo. 57, l. c. 70, 252 S. W. 394;
Korompolis v. Tompras, 251 S. W. 80 (St. Louis Court of Appeals);
Northrip v. Burge, 255 Mo. 641, 164 S. W. 584.

By the last clause of each instrument it was provided that in the event the beneficiary should predecease him the trust property was to revert to Mr. Guy. This provision did not prevent the granting clause from operating, but had the effect of attaching to the operation thereof a condition subsequent upon the happening of which the estate which had already passed to the trustee and the benficiary by virtue of the granting clause should determine and revert to Mr. Guy. The complete and absolute equitable

fee previously granted was converted into a determinable or defeasible fee.

> Deacon v. St. Louis Union Trust Company, 271 Mo. 669, l. c. 678, 679, 689, 691, 197 S. W. 261.

In that case the will left property to trustees to be held for the benefit of named children for thirty years and then distributed to them with a provision that in the case of the death prior to distribution of any of them without issue his or her share should go to the survivors of the children, or their issue.

On page 691 the Supreme Court of Missouri said:

> "The effect of clause 8, therefore, is to modify the absolute estate vested in each child by the prior provisions of the will, into a present interest, but one subject to be divested by a condition subsequent, namely, death before the end of the trust period leaving or not leaving issue as the case may be, **thus creating a defeasible instead of an absolute fee.**" (Emphasis ours.)

To the same effect are:

> Pollard v. Union National Bank, 4 Mo. App. 408;
> Patrick v. Blair, 119 Mo. 105, 24 S. W. 767;
> Edson v. Lucas, 40 Fed. (2) 398 (C. C. A. 8).

In the Schwarz case and the Orthwein case a life estate was granted with a remainder in the grantor. In the present case a defeasible fee was granted to each beneficiary with a bare possibility of reverter in the grantor. See Deacon v. St. Louis Union Trust Co., supra, l. c. 690, where the Court said: "The interest of the parents as we have seen is that of a defeasible fee. **After a fee nothing remains.**" (Emphasis ours.) It is submitted that there is

no similarity between the instant case and the two cited cases.

An additional distinction lies in the fact that in the Schwarz case and in the Orthwein case only the remainder interest of the grantor was sought to be taxed, and this fact was urged in the petition for certiorari as distinguishing the Orthwein case from the case of Commissioner v. Wallace, 71 Fed. (2) 1002 (C. C. A. 2), certiorari denied 293 U. S. 600.

In this case, as in the Wallace case, the entire value of the trust property is sought to be subjected to tax.

With respect to the second reason assigned—namely, the similarity between the trusts here involved and the trusts involved in Helvering v. Duke, 290 U. S. 591—there is substantial similarity between the trusts here involved and the trust created for Doris Duke to be distributed to her upon her arrival at certain ages. However, no uncertainty exists by reason of the decision of this Court in the Duke case when applied to the facts in the instant case. The situation here is identical in principle to that involved in McCormick v. Burnet, 283 U. S. 784, which was decided by a unanimous court.

The case of Commissioner v. Wallace, 293 U. S. 600, disposed of any doubts which might have existed by reason of the decision in the Duke case, when applied to a situation where not merely a life estate, but the entire interest of the grantor is presently conveyed either by way of a fee or a life estate with a vested remainder over, notwithstanding the fact that the estate thus granted may be defeated upon the happening of a condition subsequent. As stated in the petition for certiorari in the Orthwein case, all the considerations advanced under reason 2 in the instant case were present both in the Orthwein case and in the Wallace case. The petition was denied in the Wallace case and was

granted in the Orthwein case. In the Orthwein case there was the additional factor of a conflict between the Orthwein case and the Schwarz case. We must assume that the writ was granted because of this conflict. No such conflict exists in the instant case, and we respectfully submit that the writ should be denied.

To grant the writ in this case would permit the Government to discriminate among taxpayers for the reason that it has failed to apply for certiorari in the cases of Commissioner of Internal Revenue v. Bonney, 75 Fed. (2) 1008 (C. C. A. 2), and Commissioner v. Dunham, 73 Fed. (2) 752 (C. C. A. 7).

The third reason assigned for the granting of the writ —namely, that the Circuit Court of Appeals in the instant case erred in holding that there was no evidence to support the conclusion of law of the trial court that the transfers were made in contemplation of death, for the reason that the trust instruments provided for the distribution of the corpus of the estates at the death of the grantor— is without merit. A contrary holding by the Circuit Court of Appeals would have conflicted with the decisions of this Court in

Reinecke v. Northern Trust Company, 278 U. S. 389;
May v. Heiner, 281 U. S. 238;
McCaughn v. Carnill, 43 Fed. (2) 69 (C. C. A. 3), certiorari denied 283 U. S. 825;
Hodgkins v. Commissioner, 44 Fed. (2) 43 (C. C. A. 7), certiorari denied 283 U. S. 825;
Burnet v. Northern Trust Company, 283 U. S. 782;
Morsman v. Burnet, 283 U. S. 783;
McCormick v. Burnet, 283 U. S. 784;

in all of which cases no distribution of the trust property could have been made except upon or with reference to the death of the grantor, and in each of these cases it

was either expressly held that the trusts were not created in contemplation of death or it was conceded by the Government that this fact had no tendency to establish that the trusts were so created.

In conclusion, it is respectfully submitted that the reasons advanced in the petition herein lack the merit required by rule 38 and, therefore, the petition should be denied.

Respectfully submitted,

RHODES E. CAVE,
THOMAS S. McPHEETERS,
CRAWFORD JOHNSON,
Attorneys for Respondents.